

REQUEST FOR RECONSIDERATION OF FEDERAL SUBSISTENCE BOARD'S DETERMINATION UPON PROPOSAL FRFR 06-01 REGARDING GUSTAVUS

By State of Alaska

I. Introduction.

The State of Alaska, through the Alaska Department of Fish and Game (ADF&G), respectfully requests that the Federal Subsistence Board (Board) reconsider and rescind its decision of November 17, 2006, on Fisheries Request for Reconsideration (FRFR) 06-01, which adopts final rules establishing a customary and traditional use determination for salmon, Dolly Varden, trout, smelt, and eulachon for the community of Gustavus in sections 14B and 14C of fisheries management District 14 in Southeast Alaska.

Reconsideration is required because, in adopting the final rule, "the Board's interpretation of information, applicable law, or regulation [was] in error or contrary to existing law." 36 CFR §242.20(d); 50 CFR §100.20(d).

The Board's finding of customary and traditional use of fish by residents of Gustavus is based on several inconsistencies with applicable law, particularly the Alaska National Interest Lands Conservation Act (ANILCA), as follows:

- The Board's finding creates a preference for uses that are not within the definition of "subsistence uses" in Section 803 of ANILCA;
- The Board did not balance the competing purposes of ANILCA as set out in *Ninilchik Traditional Council v. United States*, 227 F.3d 1186, 1193 (9th Cir.2000); and
- The finding will cause unnecessary restriction of nonsubsistence use in violation of section 815 of ANILCA.

The finding of customary and traditional use is inconsistent with the Board's regulations in 36 CFR §242.16 and 50 CFR §100.16 and inconsistent with the Board's own regulatory process, as follows:

- The Board made the finding without a reasonable examination of the definition of customary and traditional use and the eight regulatory factors for making customary and traditional use determinations;
- The Board unreasonably declined to defer consideration of the proposal pending compliance with directions from the Secretary requiring the Board to develop written procedures or policies for rendering customary and traditional use determinations;

- The Board violated its own procedures and Secretarial direction by unreasonably denying the Alaska Department of Fish and Game Board Liaison the ability to provide information and discuss relevant issues during deliberations; and
- The Board lacked the necessary jurisdiction to make the traditional and customary use determination at issue because the Federal Government has not legally and properly established reserved water rights in the waters covered by its determination.

The Board's customary and traditional use determination is in error and lacks substantial evidence. The adopted regulation designates fishing in an area as a customary and traditional use without supporting information on the record. Specifically, the Board did not evaluate which fish species and stocks were used by the community and did not evaluate the geographic areas covered by the finding. Instead, the Board applied the finding to excessively broad areas without demonstrating that species and stocks harvested by the community were involved and extended the determination to several fish species for which no documented use by the community exists.

In requesting reconsideration, the State does not waive any rights it has to pursue other legal remedies available to it under applicable law, including court action. Further, the State takes the position that, under the circumstances presented, it is not necessary to file a request for reconsideration in order to exhaust administrative remedies. The State is aware that the substance of the Board's action may have been superseded by the Board's actions on FP07-17; this Request for Reconsideration will, however, provide the Board with notice that in the event that any part of FRFR 06-01 has not been superseded by the Board's actions on FP07-17 it should be reconsidered and that, in the event that the Board's action on FP07-17 is reconsidered or overturned, the Board's decision on FRFR06-01 should not be reinstated.

Because the Board did not properly consider the issue under the requirements of ANILCA and the Board's regulations and because the Board based its decision on factual errors, the determination is arbitrary and capricious. As provided by 36 CFR §242.20(d)(4) and 50 CFR §100.20(d)(4), a detailed statement follows.

II. Regulations Challenged.

At its meeting on November 17, 2006, the Board considered Proposal FRFR 06-01, which requested reconsideration of the Board's January 2006 decision to table Fisheries Proposal (FP) 06-23. Proposal FRFR 06-01 amends portions of sections 36 CFR §242.24 and 50 CFR §100.24, which address the Southeastern Alaska Area customary and traditional use determinations for salmon, Dolly Varden, trout, smelt, and eulachon. Proposal FRFR 06-01 added positive customary and traditional use determinations for residents of Gustavus in sections 14B and 14C of District 14.

The Southeast Alaska Regional Advisory Council recommended the Board table the original proposal (FP06-23) based on a lack of substantial data concerning where the customary and traditional use of fish by residents of Gustavus occurred.¹ In its May 2006 meeting, the Council recommended that the Board take no action on the request for reconsideration (FRFR06-01). At the October 2006 meeting, the Council developed a proposal to address the customary and traditional use of fish species throughout the Icy Strait and Cross Sound area as a regional proposal during the next Board cycle and took no action on FRFR06-01.²

The Interagency Staff Committee (ISC) supported the original Southeast Council recommendation in January 2006 for the Board to table FP06-23. Upon reconsideration in October, the ISC supported a positive determination for Gustavus based on information provided in FRFR06-01 that was not previously considered. This information included a 1992 ADF&G map showing general areas in which survey respondents had fished;³ a 1996 ADF&G sensitivity to disturbance map; and ADF&G subsistence and personal use fishing permit data for Icy Strait and Cross Sound.

The ADF&G objected to the proposed determination based on a lack of necessary information and requested deferral of a determination until after the Board completes development of policies and procedures for rendering such determinations as required by the Secretarial directive of October 27, 2005,⁴

The ADF&G pointed out the lack of species and area specific use data necessary to support a positive customary and traditional use determination. Thorough species by species and area by area use information is necessary for the Boards to address the regulatory factors at 50 CFR §100.16(b) and 36 CFR §242.16(b).⁵ ADF&G noted that one of the species covered by the proposed determination may not exist within sections 14B and 14C. Further, the record failed to show evidence of harvests of three species (trout, smelt, and eulachon) by residents of Gustavus.⁶ ADF&G also requested that any determination be limited to areas in which there is evidence to actually demonstrate that

¹ See January 2006 Board Materials at 332.

² See Staff Analysis FRFR06-01 at 2-3 (October 31, 2006).

³ See Staff Analysis FRFR06-01 at 6 (October 31, 2006). See also *id.* at 12 (Map 2)(showing some fishing use of some parts of sections 14A, 14B, and 14C).

⁴ See ADF&G Detailed Comments on FRFR06-01 for the Federal Subsistence Board Meeting on November 16, 2006.

⁵ See *id.* at 2-3; Transcript at 183, 185, 186.

⁶ Transcript at 185. See also January 2006 Board Materials at 341 (Table 3 Gustavus 1987 Participation and Harvest levels; showing no specific harvest of trout, smelt, or eulachon, and showing that only 2 percent of households used or harvested unknown non-salmon fish).

the use has occurred. ADF&G provided a map showing that there is very little federal land open to subsistence use in the vicinity of Gustavus.⁷

The ADF&G was denied the ability to further explain the missing information and to express its concerns during the Board's deliberations because of an arbitrary and capricious ruling of the Chair and the Solicitor's Office made during the meeting in violation of prior Secretarial direction.⁸

On November 17, 2006, the Board adopted the recommendation of the ISC, providing a positive customary and traditional use determination for Gustavus for salmon, Dolly Varden, trout, smelt, and eulachon in all of sections 14B and 14C. This regulatory action is not published in the *Federal Register*, and to the best of the State's knowledge has not been published elsewhere, and nothing in the Board's regulations or decision provides for an immediate effective date. However, the State was informed by federal staff that the action was effective immediately.⁹ The State does not agree that the Board's action on this matter can be effective immediately without publication, and reserves the right to supplement this RFR since the timeline for submittal has not been properly triggered.

The effect of FRFR06-01 is an amendment in regulations to provide a federal preference to residents of Gustavus for harvest of salmon, Dolly Varden, trout, smelt, and eulachon in all of sections 14B and 14C. Nonlisted rural residents, along with other state users will not be eligible to participate in these fisheries and will be limited to participation in state fisheries. The current federal preference provides an exemption from state sport fish license requirements, allows liberalized gear and bait use, allows fishing within 300 feet of fish ladders, and allows accumulation of state and federal harvest limits. In times of shortage, preferences may be provided to federal users through special actions or through failure to mirror State emergency orders for federal users. The State has already expressed strong concern regarding the sustainability of trout

⁷ Attachment 1. *See also* Transcript at 183-85, 186, 188 (discussions of jurisdictional issues and of the need to demonstrate use on the federal public lands).

⁸ *See* Transcript at 162 (ruling that the State could not participate during deliberations except in response to direct questions from Board members); Attachments 2 and 3 (Letters from Secretary Norton to Mitch Demientieff and Governor Murkowski indicating that the Secretary expected the Chair to recognize the State and that the State Liaison position was intended to achieve the same benefits as would a nonvoting Board membership.) *See also* Transcript of December 11-12 Board Meeting at 128-132 (Apology).

⁹ Personal Communication between Sarah Gilbertson & Bill Knauer on November 28, 2006.

populations under liberal federal subsistence regulations in Southeast Alaska¹⁰ and is concerned about any increase in the number of eligible users. The customary and traditional use determination can be expected to lead to increased harvest of fish not eligible for harvest under state regulations and to restrictions on non-federally qualified users on federal lands. Liberalization of methods and means and increased harvest on federal lands may require adjustment of seasons and harvest restrictions under state law in order to ensure compliance with the sustained yield mandate of the Alaska Constitution.

III. Discussion: The Board's Finding is Inconsistent with ANILCA and Subsistence Management Regulations, is in error, and the resulting Regulations are Arbitrary.

A. The Board's action is inconsistent with ANILCA because the resulting regulations authorize a subsistence priority for fishing that is not customary or traditional.

Reconsideration is required because, in adopting the customary and traditional use determination, the Board did not adhere to the provisions of Section 803 of ANILCA, which authorizes only "subsistence uses" that are defined as "customary and traditional uses."

The Board did not have substantial evidence that fishing for all five fish species (salmon, Dolly Varden, trout, smelt, and eulachon) occurred on all of the federal public lands in sections 14B and 14C as a customary and traditional use by residents of Gustavus. The Board had no evidence of use of significant portions of this area and had no evidence of patterns of use for particular fish species and stocks in any part of section 14B or 14C. The Board even lacked evidence of the existence of one of the fish species, eulachon, within the area. Nonetheless, the Board made a positive customary and traditional determination for "salmon, Dolly Varden, trout, smelt, and eulachon" for the community of Gustavus. Detailed discussions of what evidence was and was not available to the Board is described under each of the factors required by regulation below in section "B."

In making its determination for "salmon, Dolly Varden, trout, smelt, and eulachon" in Gustavus, the Board ignored the record, which showed no use of trout, smelt, and eulachon, ignored the fact that eulachon might not even be present, and ignored the complete lack of evidence of harvest patterns for stocks on the lands subject to claims of federal jurisdiction. The Board also ignored information indicating that no

¹⁰ See, e.g., ADF&G Final Comments on 2006-2007 Federal Subsistence Fishery Proposals, at 12-13 (January 9, 2006)(Comments on FP06-24); ADF&G RFR on FP06-24 (May 26, 2006).

subsistence fishing use by Gustavus residents had occurred in much of 14B and that such use was completely absent in most of 14C. Thus, in addition to making a geographically overbroad determination, the Board made a customary and traditional use determination for “salmon, Dolly Varden, trout, smelt, and eulachon” without substantial evidence of such use and despite evidence that a least one species was not even present in the area.

“[R]egulations, in order to be valid, must be consistent with the statute under which they are promulgated.” *United States v. Larionoff*, 431 U.S. 864, 873, 97 S.Ct. 2150, 2156 (1977). ANILCA authorizes only subsistence uses that are “customary and traditional.” Section 803 of ANILCA defines “subsistence uses” as follows:

As used in this act, the term “subsistence uses” means the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade.

16 U.S.C. § 3113. To be a valid subsistence use, any fishing must be “customary and traditional.” This statute should be narrowly construed because it constitutes a federal encroachment on a basic aspect of state sovereignty, a state’s authority over management of fish and game within its borders.¹¹

Federal courts have already acknowledged that ANILCA only authorizes “customary and traditional” subsistence uses on federal public lands in Alaska. *United States v. Alexander*, 938 F.2d 942, 948 (9th Cir. 1991). Only subsistence uses that are “customary and traditional” are subject to ANILCA’s priority provisions. There is nothing in the Board’s record to support the assertion that fishing by residents of Gustavus for salmon, Dolly Varden, trout, smelt, and eulachon on any federal public lands in sections 14B and 14C is “customary and traditional.” By making an unsupported customary and traditional use determination, the Board provides a subsistence priority for fishing that does not fall within ANILCA’s definition of “subsistence uses.” Thus, the

¹¹ “[I]f Congress intends to alter the usual constitutional balance between the states and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.” *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Accordingly, courts will not construe a statute to alter the federal balance unless that result is unmistakably clear in the language of the statute. *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765, 768, 120 S.Ct. 1858, 1870 (2000). ANILCA’s subsistence provisions involve the balance of federal power because management of fish and wildlife within its borders is “peculiarly within [a state’s] police powers.” *Baldwin v. Fish and Game Comm’n of Montana*, 436 U.S. 371, 391 (1978).

Board's action providing a customary and traditional use determination for residents of Gustavus for salmon, Dolly Varden, trout, smelt, and eulachon is inconsistent with ANILCA, and reconsideration is required.

B. The Board's finding is inconsistent with the regulatory definition of customary and traditional use and did not apply the regulatory criteria for making a finding of customary and traditional use.

Reconsideration is required because, in adopting the customary and traditional use determination, the Board failed to follow the regulatory definition of customary and traditional use and the regulatory criteria for finding customary and traditional use. As a result, the Board made an unsubstantiated and overly broad customary and traditional use determination.

1. The Board did not apply the regulatory definition of "customary and traditional use."

By regulation, "customary and traditional use" is defined to mean:

[A] long-established, consistent pattern of use, incorporating beliefs and customs which have been transmitted from generation to generation. This use plays an important role in the economy of the community.

36 CFR §242.4; 50 CFR §100.4. Evidence before the Board of subsistence use by Gustavus residents of salmon, Dolly Varden, trout, smelt, and eulachon in all of sections 14B and 14C does not meet the regulatory definition of "customary and traditional use."

The information available to the Board did not establish a "pattern of use" of the federal public lands in sections 14B and 14C for any of these species. At most, the record indicated that some fishing had occurred for two species of salmon on some federal public lands open to subsistence, but other salmon species were not harvested on federal public lands open to subsistence, and no use occurred for three species.¹² Additionally, the Staff Analysis acknowledged that the data "did not document use of

¹² See January 2006 Meeting Materials at 341; Staff Analysis at 8, 10 (Gustavus 1987 Participation and Harvest Levels)(showing no use of trout, smelt or eulachon), (Table 4. Gustavus Subsistence/Personal Use Salmon Harvests Reported by Stream 1997-2001)(Showing very limited use of pink and sockeye salmon -- Note: of the streams listed on the table most are either not within sections 14B and 14C or are within the Glacier Bay National Park and are closed to subsistence use- of the listed streams only the Neka River and Mud Bay River are within sections 14B and 14C and open to subsistence use.)

smelt or eulachon,”¹³ and ADF&G questioned whether eulachon even exist in these sections.¹⁴ Similarly, the data only indicated use of Dolly Varden and Char, not trout,¹⁵ and the only area and species specific information contained in the record is limited to salmon. The salmon information does not demonstrate a community “pattern of use” for any salmon stock in any stream because it shows minimal use of even the most predominant species, sockeye, and virtually no use of Chinook or coho.¹⁶

Most federal lands near Gustavus are not open to subsistence harvest.¹⁷ For the limited federal lands open to subsistence use in District 14, there is little or no documentation of any harvest at all, and certainly not a “long-established, consistent pattern of use,” by any current or past residents of Gustavus.¹⁸ The lands immediately around Gustavus are subject to state jurisdiction and almost all marine waters in the area are also subject to state jurisdiction; ANILCA subsistence provisions do not apply in the majority of the lands and waters in sections 14B and 14C. The record completely failed to demonstrate a significant “pattern of use” of any fish stock on the federal public lands in section 14B or 14C as required by the regulatory definition of a “customary and traditional” use.

For large portions of sections 14B and 14C, the record before the Board indicated that there was no subsistence use.¹⁹ The Board’s action to provide a positive customary and traditional use determination for these areas was not supported by data. The Gustavus Subsistence Fish Area (Map 2) showed that limited use by Gustavus residents occurred only in fringe areas within section 14B and, that Gustavus residents did not use

¹³ Staff Analysis at 7.

¹⁴ ADF&G Detailed Comments on FRFR06-01 at 2.

¹⁵ See January 2006 Meeting Materials at 341; Staff Analysis at 8 (Gustavus 1987 Participation and Harvest Levels).

¹⁶ Staff Analysis at 10 (Gustavus Subsistence/Personal Use Salmon Harvests Reported by Stream 1997-2001)(Only sockeye and pink salmon were shown to be harvested on the two streams within 14B and 14C not closed to subsistence use, the Neka River and the Mud Bay River).

¹⁷ Although there are extensive Federal public lands around Gustavus, most of these lands are within the Glacier Bay National Park, which is closed to subsistence harvest.

¹⁸ Limited fishing in more distant areas where the cost of fuel for transportation is likely to exceed the value of the fish is consistent with sport fishing, not subsistence, and such fish can not reasonably be determined to play an important role in the economy of a community.

¹⁹ See Staff Analysis at 12 (Map 2; Gustavus Subsistence Fish Area)(Showing the areas used by Gustavus residents for subsistence fishing based on ADF&G TRUCS data (1992), ADF&G Subsistence sensitivity to disturbance maps (1996), and ADF&G subsistence and personal use permit data (1997-2001)).

those lands and waters near the community of Hoonah in Port Fredrick.²⁰ The Gustavus Subsistence Fish Area (Map 2) also showed that residents of Gustavus did not use any lands or waters on the south shore of Icy Straight in section 14C and, in fact, did not use any lands and waters of 14C except for a small fringe on the east side of Excursion Inlet.²¹ Because no use was shown for these lands, any finding of a pattern of use necessary for a positive customary and traditional use determination is completely unsupported.

2. The Board did not evaluate the eight regulatory criteria on the record for rendering a finding of a “customary and traditional” use:

The regulations require the Board to determine which fish stocks and wildlife populations have been customarily and traditionally used for subsistence and to identify the specific community's or area's use of specific fish stocks and wildlife populations. 36 CFR §242.16(a); 50 CFR §100.16(a). The following eight specific factors must be generally exhibited for the Board to make a finding of customary and traditional use:

- (1) A long-term consistent pattern of use, excluding interruptions beyond the control of the community or area;
- (2) A pattern of use recurring in specific seasons for many years;
- (3) A pattern of use consisting of methods and means of harvest which are characterized by efficiency and economy of effort and cost, conditioned by local characteristics;
- (4) The consistent harvest and use of fish or wildlife as related to past methods and means of taking; near, or reasonably accessible from, the community or area;
- (5) A means of handling, preparing, preserving, and storing fish or wildlife which has been traditionally used by past generations, including consideration of alteration of past practices due to recent technological advances, where appropriate;
- (6) A pattern of use which includes the handing down of knowledge of fishing and hunting skills, values, and lore from generation to generation;

²⁰ Available information in the record indicated that during all the years for which data was available, only one Gustavus permit holder reported harvest in this area, harvesting 3 sockeye and 2 pinks in 2001. *See* Staff Analysis at 10 (Neka River).

²¹ The primary areas of use were within Glacier Bay National Park where subsistence fishing is prohibited. *Compare* Staff Analysis at 12 (Map 2) and Attachment 1 (Map showing boundaries of Glacier Bay National Park as well as State, private, and Forest Service lands in 14A, 14B, and 14C).

- (7) A pattern of use in which the harvest is shared or distributed within a definable community of persons; and
- (8) A pattern of use which relates to reliance upon a wide diversity of fish and wildlife resources of the area and which provides substantial cultural, economic, social, and nutritional elements to the community or area.

36 CFR. §242.16(b); 50 CFR §100.16(b).

The information before the Board and analysis of the eight factors was not sufficient to show a “pattern of use” of any stock of the five salmon species or for Dolly Varden, trout, smelt, or eulachon stocks on any of the federal public lands subject to the Board’s determination. The Board did not attempt to apply the eight criteria in any level of detail on the record, failed to establish that one of the species (eulachon) exist within the area, and failed to establish any significant harvest of other stocks on the federal lands.

The written staff report purported to apply the eight factors; however, this analysis was perfunctory and was fundamentally flawed because it was not based on a “pattern of use” by the community of Gustavus in specific waters on the federal public lands for each covered fish stock (or even each species). The regulatory requirement for customary and traditional use determinations is to **“identify the specific community’s or area’s use of specific fish stocks and wildlife populations,”** 36 CFR §242.16(a); 50 CFR §100.16(a) (emphasis added). Thus, wherever the regulations require a “pattern of use,” the regulations are referencing a pattern of use of a specific area or of a specific stock or population, and that specific area or stock/population pattern of use must be by a specific community. Six of the eight factors refer to a “pattern of use.” This “pattern of use” required by factors 1 through 3 and 6 through 8 was not shown for the stocks and areas covered by the Board’s determination.

3. Evidence available to the Board did not support the following regulatory factors necessary to demonstrate a “pattern of use”

Factor One:

The first and most important factor is a “long-term consistent pattern of use, excluding interruptions beyond the control of the community or area.” The information available to the Board could not support a positive analysis for this key factor for the entire area for any species covered by the determination²² and certainly did not support a positive analysis for all fish species and specific stocks

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See Staff Analysis at 12 (Map 2)(showing limited area of use).

covered by the determination.²³ Even for species for which there was evidence of use (all five salmon species and Dolly Varden), there was no evidence in the record that stocks found on the federal public lands available for subsistence use were the same stocks for which there was a pattern of use.²⁴

Thus, factor one's community "pattern of use" was not demonstrated for the area, species, and stocks covered by the Board's customary and traditional use determination for salmon, Dolly Varden, trout, smelt, and eulachon. The available data showed some use of salmon and Dolly Varden but did not show use of stocks from the federal public lands, and certainly did not show a "pattern of use." The Board did not even attempt to identify specific areas or stocks for which a pattern of use might exist.

Factor Two:

The second factor is a "pattern of use recurring in specific seasons for many years." This factor was not analyzed by the Board in any detail. The only areas examined showed minimal harvest, far short of a community pattern of use.²⁵ Within 14B and 14C, only two streams on federal lands available for subsistence use were shown to support any harvest by residents of Gustavus. For each of these streams, over the 1997 -2001 period, only 1 permit holder reported harvest during

²³ The available information did not show any use of trout, smelt, or eulachon.

²⁴ Most salmon harvest in Southeast Alaska occurs in fisheries managed by the state in state marine waters; only minimal harvests were shown in areas open to subsistence use where waters are subject to a claim of federal jurisdiction in 14B and 14C. *See* Staff Analysis at 10 (Table 4)(The Mud Bay River and Neka River are the only waters within 14B and 14C which are not within the confines of Glacier Bay National Park; and for the period between 1997 and 2001, only one permit holder reported harvest in one year for each of these areas--with 28 pink salmon reported from the Mud Bay River and 3 sockeye and 2 pink salmon reported from the Neka River.) Dolly Varden are also harvested incidentally in marine fisheries, and may have also been harvested in small streams near Gustavus under State jurisdiction or within the Glacier Bay National Park in areas not open to federal subsistence harvest, nothing in the record ties Dolly Varden harvests to stocks present on federal public lands open to subsistence.

²⁵ *See* Staff Analysis at 10 (Table 4)(Note that the area showing the most use in the table, with a maximum annual number of 4 permit holders and 58 sockeye harvested, Surge Bay, is not within section 14B or 14C and would certainly involve different stocks than those subject to harvest on federal public lands in 14B and 14C). Of the streams and rivers listed in Table 4, only the Neka River and Mud Bay River are within 14B and 14C and outside the boundaries of the Glacier Bay National Park where subsistence fishing is prohibited).

one year and only reported harvest for pink and sockeye salmon.²⁶ Thus, the record demonstrates no “pattern of use recurring in specific seasons for many years” for any stock, and certainly does not demonstrate a pattern of recurring use for all stocks of salmon, Dolly Varden, trout, smelt, and eulachon.

Factor Three:

The third factor is a “pattern of use consisting of methods and means of harvest which are characterized by efficiency and economy of effort and cost, conditioned by local characteristics.” This pattern could not be shown based on the available information. Harvest rates were too low to indicate any “efficiency and economy of effort.”

The Board did not limit the determination to areas near the community of Gustavus, and, given the low harvest rates, it would not be consistent with efficiency and economy of effort and cost to travel to more remote locations to harvest salmon, Dolly Varden, trout, smelt, or eulachon. Low harvest levels spread across a large geographic area are not consistent with a “pattern of use consisting of methods and means of harvest which are characterized by efficiency and economy of effort and cost” and appear to reflect sport fishing rather than subsistence fishing.

Factor Six:

The sixth factor is a “pattern of use which includes the handing down of knowledge of fishing and hunting skills, values, and lore from generation to generation.” The Staff Report did not explore this factor with relation to fish stocks found on the federal public lands open to subsistence harvest.²⁷ The community of Gustavus was established in 1955, so at the time ANILCA passed in 1980, there was limited probability of a multi-generational “pattern of use” being established. While a few individuals within the community may participate in fishing, no information that met this criteria of a community generational pattern was available to the Board.

²⁶ See Staff Analysis at 10 (Table 4)(The Mud Bay River and Neka River are the only waters within 14B and 14C which are not within the confines of Glacier Bay National Park, and for the period between 1997 and 2001, only one permit holder reported harvest in one year for each of these areas; with 28 pink salmon reported from the Mud Bay River and 3 sockeye and 2 pink salmon reported from the Neka River.)

²⁷ See Staff Analysis at 11; January 2006 Meeting Materials at 342.

Factor Seven:

The seventh factor is a “pattern of use in which the harvest is shared or distributed within a definable community of persons.” For trout, smelt, and eulachon, no evidence of sharing could be shown because no harvest was shown. With regard to salmon, there was general evidence of sharing, but there was no evidence of sharing of stocks of salmon found on the federal public lands.

Factor Eight:

The eighth factor is a “pattern of use which relates to reliance upon a wide diversity of fish and wildlife resources of the area and which provides substantial cultural, economic, social, and nutritional elements to the community or area.” The Board’s broad approach was flawed because it did not look at use of fish stocks from the federal public lands open to subsistence use. There was no documentation of a pattern of use relating to reliance on fish stocks from the federal public lands open to subsistence use.

As shown above, based on the available information, the six factors requiring a “pattern of use” do not support a customary and traditional use determination for salmon, Dolly Varden, trout, smelt, and eulachon from the federal public lands open to subsistence use in sections 14B and 14C. Nothing in the available information indicates that the community of Gustavus “generally exhibits” the “pattern of use” factors for use of salmon, Dolly Varden, trout, smelt, or eulachon stocks from federal public lands open to subsistence use in sections 14B and 14C.

4. Evidence before the Board did not support the remaining regulatory factors because there was no evidence of use of specific stocks and areas.

The two remaining factors that do not refer to a “pattern of use,” factor 4 and factor 5, are based on specific stocks and areas and uses of stocks in those areas under 36 CFR §242.16(a) and 50 CFR §100.16(a). These two factors are not supported by evidence and, thus, do not support a customary and traditional use determination for salmon, Dolly Varden, trout, smelt, and eulachon on all federal public lands in sections 14B and 14C.

Factor Four:

Factor four contains an explicit geographic reference:

A consistent harvest and use of fish or wildlife as related to past methods and means of taking; near, or reasonably accessible from the community or area.

36 CFR §242.16(b)(4); 50 CFR §100.16(b)(4). The record does not show any harvest and use, much less “consistent harvest and use” in much of sections 14B and 14C and does not show any use at all in 14B or 14C for trout, smelt, or eulachon. Even for salmon, the only evidence in the record of harvests from areas open to subsistence use and subject to a claim of federal jurisdiction were reports by a single permit holder in a single year for the Mud Bay River and the Neka River. Thus, there has been no “consistent harvest and use,” and the community of Gustavus does not “generally exemplify” factor four for use of salmon, Dolly Varden, trout, smelt, and eulachon in all of sections 14B and 14C.

Factor Five:

Factor five deals only with handling, but under 36 CFR §242.16(a) and 50 CFR § 100.16(a)), this use must be tied to the fish stock or wildlife population for which a customary and traditional use finding is made:

A means of handling, preparing, preserving, and storing fish or wildlife which has been traditionally used by past generations, including consideration of alteration of past practices due to recent technological advances, where appropriate.

36 CFR § 242.16(b)(5); 50 CFR § 100.16(b)(5). Harvests of trout, smelt, and eulachon were not shown to occur, and significant harvests of salmon and Dolly Varden were not shown to come from sections 14B and 14C, much less from particular stocks in sections 14B and 14C. Similarly, significant harvests of salmon were not shown to come from waters open to subsistence fishing and subject to a claim of federal jurisdiction.²⁸ The record does not support a finding that the community of Gustavus “generally exhibits” handling, preparing, preserving, and storing salmon, Dolly Varden, trout, smelt, and eulachon on all the waters of sections 14B and 14C.

²⁸ See Staff Analysis at 10 (Table 4)(The Mud Bay River and Neka River are the only waters within 14B and 14C which are not within the confines of Glacier Bay National Park, and for the period between 1997 and 2001, only one permit holder reported harvest in one year for each of these areas; with 28 pink salmon reported from the Mud Bay River and 3 sockeye and 2 pink salmon reported from the Neka River.)

5. The regulatory factors are not “generally exhibited.”

As shown above, the eight regulatory factors are not “generally exhibited” for residents of Gustavus for “salmon, Dolly Varden, trout, smelt, or eulachon.” The eight regulatory factors for making a customary and traditional determination were not properly applied. Based on the available information, if the factors were properly applied, the Board could not show customary and traditional use by residents of Gustavus for salmon, Dolly Varden, trout, smelt, and eulachon on any, and certainly not on all, federal public lands open to subsistence use in sections 14B and 14C. Any taking of fish stocks by residents of a community or area from outside the area in which historical use patterns have been shown does not fall within the regulatory definition of “customary and traditional use” because there is no “long-established, consistent pattern of use” of the stock or area. *See* 36 CFR §242.4; 50 CFR §100.4.

The Board is bound by existing federal regulations regarding customary and traditional use determinations. Thus, because the Board’s determination was overly broad and because use of salmon, Dolly Varden, trout, smelt, and eulachon from all federal public lands in sections 14B and 14C is not a “customary and traditional” practice, reconsideration is required.

C. The regulations are inconsistent with ANILCA because they are likely to cause unnecessary restrictions of nonsubsistence use.

Reconsideration is required because, in adopting the customary and traditional use determination, the Board failed to recognize its duty to balance the competing purposes of ANILCA²⁹ and to prevent unnecessary restrictions on other uses. Section 815 of ANILCA provides:

Nothing in this subchapter shall be construed as:

...

(3) authorizing a restriction on the taking of fish and wildlife for nonsubsistence uses on the public lands (other than national parks and park monuments) unless necessary for the conservation of healthy populations of fish and wildlife, for the reasons set forth in section 3126 of this title, to continue subsistence uses of such populations, or pursuant to other applicable law; . . .

16 U.S.C.A. § 3125(3) (2000).

While the unsupported customary and traditional use determination in this case does not impose immediate direct restrictions on taking of fish and wildlife for other

²⁹ *See Ninilchik Traditional Council v. United States*, 227 F.3d 1186 (9th Cir. 2000).

uses, the determination does result in liberalization of take provisions for residents of Gustavus, adding the residents of Gustavus to the list of eligible participants for fishing under regulations deemed unsustainable by the State of Alaska.³⁰ The cumulative impacts of such decisions can be expected to require further restrictions to state fisheries in order to assure compliance with the sustained yield mandate of the Alaska Constitution. Thus, the Board's regulatory action, if not corrected, will lead to unnecessary restrictions on nonsubsistence uses in violation of section 815 of ANILCA.

Reconsideration is required because the Board failed to consider competing purposes of ANILCA, including other uses that may be impacted by the determination. The Board has previously recognized and the federal courts have acknowledged that ANILCA has a number of competing purposes, including providing for recreation and conservation which must be balanced with providing a preference for subsistence uses. *See* 16 U.S.C.A. §3115(c)(2000); 16 U.S.C.A. §3125(3) (2000); *see also, Ninilchik*, 227 F.3d at 1193. The rendering of an unnecessary customary and traditional use determination without sufficiently considering cumulative impacts on the other uses of the resources and area is arbitrary and capricious. Such decisions may result in undue restrictions on state subsistence users, other uses, and even the exclusion of other federally qualified subsistence users from hunting and fishing in an area in which they have previously hunted or fished. Sound customary and traditional use determinations are critical to the implementation of ANILCA's subsistence use priority and to ANILCA's mandate to avoid unnecessary restrictions on both subsistence and other uses of fish and wildlife. The Board rendered the unnecessary and unsupported customary and traditional use determination for salmon, Dolly Varden, trout, smelt, and eulachon for Gustavus residents in 14B and 14C without balancing ANILCA's other purposes including its conservation and recreational purposes.

D. The Board's interpretation of existing data was in error because it was not based on full analysis of available information.

Reconsideration is required because the Board did not consider all available information and this failure led to an incorrect determination. The Board failed to thoroughly analyze available information and lack of information relating to uses of fish by the residents of Gustavus.³¹ As a result, the Board made an overly broad

³⁰ *See, e.g.,* ADF&G Final Comments on 2006-2007 Federal Subsistence Fishery Proposals at 12-13 (January 9, 2006)(Comments on FP06-24); ADF&G RFR on FP06-24 (May 26, 2006).

³¹ For example, the Board failed to consider the complete lack of evidence of use of trout, smelt, and eulachon; the absence of evidence of the presence of eulachon, the limited geographic area used for subsistence fishing, and the lack of evidence even for salmon, of harvest patterns for stocks present on lands open to subsistence fishing on lands subject to claims of federal jurisdiction.

determination, creating a subsistence preference for salmon, Dolly Varden, trout, smelt, and eulachon where there was no customary and traditional harvest by the community of Gustavus from the stocks on the federal public lands open to subsistence use. Because the Board's determination was made without fully considering all available information, and because this lack of analysis allowed the Board to make an incorrect determination, the Board's determination should be reconsidered.

E. The regulation adoption process was arbitrary and capricious.

On the morning of November 17, 2006, prior to deliberations on the Gustavus customary and traditional use determination, the Board's chair ruled that the State liaison could not participate during Board deliberations except in response to questions by Board members.³² This ruling, based on unreasonable arbitrary and capricious advice from the Solicitor's office, made in direct violation of Secretarial directive and Board procedures established in 2004,³³ precluded effective participation by the State of Alaska in the Board's deliberative process³⁴ and compounded the Board's error in unreasonably declining to defer consideration of the proposal pending compliance with directions from the Secretary requiring the Board to develop written procedures or policies for rendering customary and traditional use determinations. These errors caused, or at least contributed to, the Board's erroneous and unsupported decision to provide a positive customary and traditional use determination for salmon, Dolly Varden, trout, smelt, and eulachon for residents of Gustavus in sections 14B and 14C. Thus, because the Board made a mistake of law in excluding the State of Alaska from participation in deliberations and failing to establish and follow clear procedures for making customary and traditional use determinations, and because these mistakes of law resulted in substantive harm to the State of Alaska and resulted in or contributed to an arbitrary and capricious decision by the Board, reconsideration, during which effective participation by the State of Alaska is allowed, is required.

³² Transcript at 162-63.

³³ See Attachments 2 and 3 (Letters from Secretary Norton to Governor Murkowski, and Board Chairman Demientieff of February 24, 2004 (Noting that the State liaison position was expected to provide the same benefits as non-voting membership and that the Chair is expected to recognize the State on any issue related to coordinated management of fish and wildlife resources); Transcript December 11-12 FSB meeting at 128-132 (apology).

³⁴ As a result of this ruling the State was unable to convey to the Board the importance of the lack of information regarding harvests of trout, smelt, and eulachon, was unable to focus Board deliberations on the question of whether the record would demonstrate evidence of use of particular stocks of Dolly Varden and salmon found in areas open to subsistence fishing and subject to federal claims of jurisdiction.

F. The regulations are arbitrary and capricious.

In order to be valid, regulations must be reasonable, and not arbitrary or capricious. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415, 91 S.Ct. 814, 822 (U.S. 1971).

The Board regulation making a customary and traditional use determination for Gustavus for salmon, Dolly Varden, trout, smelt, and eulachon is arbitrary and capricious for four reasons. First, as shown above, the Board's actions were inconsistent with the statutory definition of "subsistence use." Second the action was inconsistent with the Board's own regulations because the Board did not adequately consider regulatory definitions and factors and the record did not contain substantial evidence to support the Board decision. Third, the Board failed to consider and balance the possible cumulative impacts on other uses and users from an overly broad positive customary and traditional use determination. Fourth, the Board unreasonably denied the State of Alaska the opportunity to meaningfully participate in deliberations on the proposal. Fifth, the Board failed to respond to concerns raised by the State and Secretary that the Board needed to develop written procedures and policies to govern customary and traditional use determinations; this failure contributed to the Board's action violating its own statutes and regulations.

The Board's violations of its statutes and regulations regarding customary and traditional use determinations and its provision of a customary and traditional use determination for activities that do not qualify as "subsistence uses" under the statutory definition in ANILCA are discussed more fully above. The object of the final rule is purportedly to provide for customary and traditional subsistence uses, but the record does not demonstrate that any of the fishing allowed is customary or traditional. The term "customary and traditional use is defined by regulation to mean:

[A] long-established, consistent pattern of use, incorporating beliefs and customs which have been transmitted from generation to generation. This use plays an important role in the economy of the community.

36 CFR § 242.4; 50 CFR § 100.4. Customary and traditional use is determined by applying eight regulatory factors which a community must "generally exhibit." While the State agrees that it is not necessary for a community to demonstrate all eight criteria, as the former Commissioner has previously indicated to the Board in discussion of another proposal, some of the factors must be met, and a long-term consistent pattern of use must be shown:

As was pointed out earlier you don't have to meet all eight factors, but it is important that you sort of meet some of them. As Ms. Armstrong correctly

said I believe, if you don't meet the first, long-term consistent pattern of use, you might as well not bother with the rest.

January 2006 Transcript at 286. The Board proceeded to make a customary and traditional use determination for Gustavus without developing a record to show a community level "long-term consistent pattern of use" relating to stocks found on the lands subject to claims of federal jurisdiction, and without even establishing a history of use of some species. Thus, the Board's action in providing a customary and traditional use determination for salmon, Dolly Varden, trout, smelt, and eulachon for Gustavus was arbitrary and capricious because it was inconsistent with the statutory definition of subsistence and with both the regulatory definition of "customary and traditional use" and the regulatory requirements for finding "customary and traditional use."

Prior to the Board's action, the State raised concerns regarding inconsistency and lack of standards used by Board for making customary and traditional use determinations. The Secretary of the Interior responded to these concerns and, on October 27, 2005, directed the Board to develop written procedures or policies for customary and traditional use determinations and to review "whether analytic thresholds and benchmarks for certain criteria are needed and appropriate for inclusion in the decision process." The State requested that the Board delay further customary and traditional use determinations until after development of these policies and procedures.³⁵ In the context of another proposal, ADF&G's previous Commissioner pointed out that the standard isn't whether a resource has been eaten for subsistence and that, if that was the standard, the Board's review process would be unnecessary:

I believe that there's probably nowhere in Alaska you can find that any species that exists hasn't been eaten at one time or another for subsistence. But if that's the standard, I can save you guys a lot of time. You don't need to do this you know. It's just all customary and traditional use. The fact that you're going through this implies that that is something – it must be narrower than the fact that, you know, I don't think there's a thing in Alaska that somebody hasn't eaten at some point when they were hungry enough and in need and they happened to be there.

So, while I have my standard of what long-term consistent pattern of use would be, what I think is most as [sic] important that this Board have its standard that it can apply consistently case by case and that's why I'm simply suggesting that you delay until you work that out.

³⁵ See, e.g., Transcript at 185.

January 2006 Transcript at 295.

The Board proceeded to make a customary and traditional use determination for Gustavus without first developing any written policies or procedures and without defining what would constitute a “pattern of use” by a community. As a result, the Board made a determination despite a lack of evidence of a community level “pattern of use” for salmon, Dolly Varden, trout, smelt, and eulachon in an area that extended beyond the areas where any pattern of subsistence fishing for any species could possibly be demonstrated.

The Board failed to follow its own regulations defining customary and traditional use and its regulations listing factors that must be “generally exhibited” before a positive customary and traditional use determination is made. The Board’s unreasonable exclusion of the State from participation in deliberations, the Board’s unreasonable failure to consider the cumulative impact of its overly broad determinations, and the Board’s unreasonable failure to adopt and follow a written policy for customary and traditional use determinations, render the final rule arbitrary and capricious. Accordingly, the Board should reconsider its decision to adopt these invalid regulations providing a customary and traditional use determination for salmon, Dolly Varden, trout, smelt, and eulachon for residents of Gustavus.

G. The Board has no jurisdiction to make the customary and traditional use determinations upon which reconsideration is requested.

The State of Alaska has legally challenged the Board’s claim to jurisdiction to make customary and traditional use determinations on most waters within Alaska, including the waters within the area covered by action on FRFR06-01, because the Federal Government has not legally and properly established water rights in the waters subject to those determinations, as is set out in the pending litigation entitled *Katie John, Gerald Nicolai, et al., Plaintiffs, v. The United States of America, et al., Defendants*, in the United States District Court for the District of Alaska, Case No. A05-0006-CV (HRH) (Consolidated). Accordingly, it is the State’s position, which it reserves and does not waive, that those determinations by the Board are illegal, void, and of no effect on that basis. The State’s position in that regard and reasons supporting it are set forth or will be set forth in its filings in that pending litigation and are incorporated herein by reference.

IV. Conclusion.

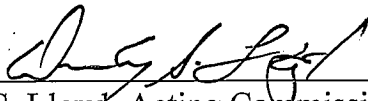
The regulations finding customary and traditional use of salmon, Dolly Varden, trout, smelt, and eulachon in waters of section 14B and 14C are inconsistent with ANILCA and with Federal subsistence management regulations. The Board’s finding ignores statutory and regulatory definitions and requirements. The Board authorized

fishing that is not customary and traditional and that will lead to unnecessary restrictions on other users. The Board ignored information that was available and unreasonably provided a subsistence preference without first even establishing the presence of one of the covered species, based on a record that completely failed to establish the existence of harvest patterns of the relevant fish stocks. The resulting regulations provide a subsistence preference for residents of Gustavus without any support for finding customary and traditional use of the relevant stocks by the community of Gustavus. The State of Alaska was unreasonably precluded from participation in deliberations on regulations, and the regulations were unreasonably adopted without development of written policies and procedures to ensure compliance with regulatory requirements. The regulations are arbitrary and capricious. For these reasons, the State of Alaska respectfully requests that the Federal Subsistence Board reconsider and rescind its final rules finding customary and traditional use of salmon, Dolly Varden, trout, smelt, and eulachon for the community of Gustavus in sections 14B and 14C of District 14 in which the Board incorrectly claims jurisdiction.

STATE OF ALASKA
DEPARTMENT OF FISH AND GAME

Dated: _____

16 Jan 07



Denby S. Lloyd, Acting Commissioner